REPORTER'S RECORD

VOLUME 4 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 114-0648-13

STATE OF TEXAS	)	IN THE DISTRICT COURT
	)	
	)	
	)	
VS.	)	SMITH COUNTY, TEXAS
	)	
	)	
	)	
	)	
JOSEPH PIERCE	)	114TH JUDICIAL DISTRICT

****

HEARING ON MOTION FOR JOINDER

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On the 5th day of August, 2013, the following proceedings came on to be heard in the above-styled and -numbered cause before the HONORABLE CHRISTI J. KENNEDY, Judge Presiding, held in Tyler, Smith County, Texas:

Proceedings reported by Computerized Machine Stenography, Reporter's Record produced by Computer-Assisted Transcription.

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114th Judicial District Court
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P R O C E E D I N G S

THE COURT: All right. Cause numbers 114-0642-13, 0648-13. State of Texas versus Marlina Adams and Joseph Pierce. Counsel for the State and counsel for each of the defendants is present. Also the defendants, Joseph Pierce and Marlina Adams, are present.

Ms. Adams and Mr. Pierce, you-all may come up here and have a seat at the counsel table next to your respective attorneys.

All right. Is the State ready on these motions?

MR. PUTMAN: We're ready, Your Honor.

THE COURT: The defense is ready?

MR. RATEKIN: Ready, Your Honor.

THE COURT: Mr. Ellis?

MR. ELLIS: Ready, Your Honor.

THE COURT: All right. Then the State may proceed on its motion.

MR. PUTMAN: Your Honor, we filed the same motion in each case to join these defendants. Under Code of Criminal Procedure 36.09, the Court can order cases be tried jointly in the Court's discretion.

We filed that because really it's the same witnesses, same transaction occurring. This is a joint

possession case. The drugs were found in the car where the two defendants were. One was driving; one was the front-seat passenger. And given that the evidence will be --

THE COURT: Well, that's the allegation.

MR. PUTMAN: That's the allegation.

THE COURT: Right.

MR. PUTMAN: Given that that would be the evidence that the State would be putting on, the evidence would be virtually identical in each case. It would be in the interest of justice and judicial economy to try them together and that's why we filed a motion.

THE COURT: Either Mr. Ratekin or Mr. Ellis, do you wish to be heard on this motion?

MR. RATEKIN: Your Honor, I filed an objection to the joinder. Basically, Your Honor, if the cases were tried together it would put Ms. Adams at a disadvantage because our entire defense would be -- we wouldn't be able to put on our entire defense the way we want to if they're joined together.

Mr. Pierce has prior felony convictions, which we would be introducing to show in our trial as well as other trial strategies. Our defense is going to be pointing a finger towards Mr. Pierce. That would be hampered if they were joined together.

I don't believe that joining the cases together would be appropriate in this situation. While what Mr. Putman said is true--it basically would be quite a lot of the same facts--there is evidence going against Mr. Pierce that does not apply to Ms. Adams. There's more evidence against Mr. Pierce than there is against Ms. Adams and that would put Ms. Adams at a disadvantage in the trial.

If the jury convicts Mr. Pierce, then they're probably going to convict Ms. Adams as well. We can't allow Ms. Adams to be tried at the same time and put on our whole entire proper defense with them joined together. That's the big -- or one of the big things, as well as the fact that we wouldn't be able to use the defense that we need to use properly.

THE COURT: Mr. Ellis, do you want to be heard on this?

MR. ELLIS: Briefly, Your Honor.

I concur with what Mr. Ratekin said. As I read 36.09 of the Code of Criminal Procedure, one of the issues the Court has to consider is--really more for Ms. Adams' case than in my client's case--that my client has a prior felony conviction.

Obviously we would object to a joinder of the cases where Mr. Ratekin would be introducing

evidence that otherwise might not ever be admissible against my client were he not to take the stand or the State finds some other prior felony conviction. I think it's pretty clear that that could be highly prejudicial on the trial of this matter.

Furthermore, Mr. Ratekin has suggested -- I believe it's very possible that the defenses for both codefendants could be antagonistic to one another so it would be prejudicial to both clients. We ask the Court to deny the State's motion to join.

THE COURT: And you-all are suggesting--and I just want to make sure this is clear--that -- are you-all suggesting or telling the Court that there is a previous admissible conviction against Mr. Pierce that would not be admissible against Ms. Adams?

MR. RATEKIN: That's correct, Your Honor.

THE COURT: Do you agree with that, Mr. Putman?

MR. PUTMAN: Well, I don't think it's admissible so I disagree. I don't think it would be admissible at the trial. Again, in either trial so -- and I agreed in my motion that if they were joined, we wouldn't -- the State wouldn't be seeking to admit it. But even if we didn't have that agreement, I don't think it would be admissible.

MR. RATEKIN: I believe it would be admissible because our first witness would be Mr. Pierce. So it would definitely be admissible. And whether the State's willing to use it or not, I plan on using it if the cases are joined together.

THE COURT: And Mr. Pierce would be willing to testify?

MR. RATEKIN: I can't -- I can't answer that question; he's not my client. But he would be my first witness.

THE COURT: Mr. Ellis?

MR. ELLIS: Your Honor, I can't say what's going to be admissible or not. I would think that -- generally speaking, I would think it would be admissible, but I don't know what Mr. Ratekin might do in preparing his defense or what the State might do.

THE COURT: Did you say generally it might or might not be admissible?

MR. ELLIS: I wouldn't have expected it to be admissible, but if the codefendant -- with the cases being joined, Your Honor, I would think it could be admissible. I don't know. My thought would be that it wouldn't be, but it seems like trials have a way of surprising, Your Honor. You never know what might happen.

I believe -- Your Honor, I also believe beyond the prior conviction of Mr. Pierce, generally speaking, the defenses would still be antagonistic and it would be improper to join the cases.

THE COURT: Mr. Putman, did you have something else you wanted to add to that?

MR. PUTMAN: I just wanted to state, Your Honor, Qualley v. State -- it's a 2006 case.

THE COURT: I'm looking at it, too.

MR. PUTMAN: It requires a showing of prejudice to show a specific trial right would be prejudiced to either one of the defendants. I don't think we have that here. I think Mr. Ellis or Mr. Ratekin might need to put on something to show what trial -- specific trial right would be prejudiced.

Mr. Ratekin indicated that part of -- I think what he was looking for in his defense is that Mr. Pierce would be testifying -- called to testify as a codefendant. In order for that to be a trial right that he would be prejudiced, he would have to show, under Lacy v. State, a bona fide need for the testimony; the substance of the desired testimony; its exculpatory nature and effect; and evidence that the designated codefendant will in fact testify if the trials were separated.

So there would have to be a showing of that. That would be something the defense would have to show if they're going to show a right's been prejudiced. I haven't heard that yet. Obviously we're not done with the hearing, so maybe it will be shown.

But if the only way Mr. Ratekin is anticipating on getting in Mr. Pierce's prior was him testifying, I think there would have to be a showing first that he would in fact testify if Mr. Ratekin called him to the stand. I obviously don't know that either since I'm not allowed to talk to Mr. Pierce and Ms. Adams without their attorneys.

But I don't think there's been a showing of that yet: that there's been any specific trial right that would be prejudiced to either defendant. And, again, we've agreed if the cases were joined we wouldn't be seeking to introduce Mr. Pierce's prior so that it wouldn't -- which would be a prejudice to Ms. Adams if we were seeking to do that.

If Mr. Ratekin wanted -- had a joint trial to put on the prior of Mr. Pierce to try to blame Mr. Pierce -- I think if it was admissible, he's certainly willing to do that since it would be him putting in the prior. It wouldn't be us putting in the prior for Mr. Pierce to try to prejudice Ms. Adams.

Mr. Adams would be putting it on to try to point the finger at Mr. Pierce.

Also, as far as mutually antagonistic defenses, that's not a reason, per se, to sever trials. And there has to be specific prejudice to a specific trial right.

THE COURT: Mr. Ratekin or Mr. Ellis, do you-all wish to be heard on that?

MR. RATEKIN: Your Honor, while I'm not at liberty to discuss my entire trial strategy at this point in time --

THE COURT: I understand that puts you in an awkward position. Go ahead.

MR. RATEKIN: It does, Your Honor. But I do believe I would be able to introduce the prior against Mr. Pierce and I do believe that I would be calling Mr. Pierce as a witness.

Now, whether he testifies or not -- I can't get in to whether he's going to testify or he's not going to testify. That's part of the trial strategy and I'm not going to be able to put on my entire trial strategy in front of the DA at this point in time.

But with that felony being out there and being admissible, the evidence going more towards Mr. Pierce than Ms. Adams, the defense being, basically,

pointing fingers at each other and would be antagonistical against each other, I believe it would jeopardize Ms. Adams' right to a fair trial based on her actions and not Mr. Pierce's actions. I think it puts her at a disadvantage in trying the case.

I do think history, his involvement in the case, his actions after being arrested as well, would all go towards Mr. Pierce. I believe that would be over on Ms. Adams -- put her in a situation where she's having to negate stuff Mr. Pierce says. And having the trials at the same time, I think, would be improper in that situation.

THE COURT: Look at --

MR. ELLIS: (Indicating.)

THE COURT: Go ahead, Mr. Ellis. Did you have something else you wanted to add?

MR. ELLIS: I would just add, Your Honor, as I indicated in my motion, I believe the specific rights that might be indicated are the right to confrontation and the right to cross-examination that might be at issue.

I also have trouble, Your Honor, with a joint trial where my client's being forced to refuse to testify when called by co-counsel--I don't know what we would be at this point--in front of the jury, whereas if

he were being tried on his own, we would just be able to not take the stand all together. I don't like the way that's going to look in front of a jury, Your Honor.

THE COURT: All right. In the Qualley case, of course, they discuss the grounds for severance. The motion for severance is to be timely--of course, this is timely. It's actually not a motion for severance; it's a motion for joinder because the Court has not joined it in the first place--and that at least one of two possible grounds for severance be alleged to support the evidence.

The two grounds of severance are that the codefendant has a previous admissible conviction or the joint trial would prejudice the moving defendant. It's not -- you don't have to prove both of those; you have to prove one of those.

At this stage, the Court cannot really tell and there hasn't been any evidence that there's a previous admissible conviction, although it sounds like there might be. The Court has not heard the evidence. I'm willing to hear any evidence if you-all have any evidence to offer.

But in Qualley, you know, even though that evidence of a prior conviction was not admitted, the court of criminal appeals said not that it was okay to

proceed together but that it was harmless error to proceed together when there was an admissible prior conviction for one of the defendants.

So the State's offer to not offer that evidence at trial doesn't take us out of the error bracket. It only takes us out of the harmful error bracket, which is not the bracket I want to be in in the first place. So if there's evidence of a previous admissible conviction and anybody wants to offer it, I'm willing to hear it.

MR. PUTMAN: And the reason I say I don't belive it's admissible, Your Honor, is I looked at the prior conviction and I just didn't see how--if I was trying to admit it--I was going to be able to get it admitted. I don't think I could admit it even if I wanted to. So I don't think it's admissible.

Mr. Ratekin has been an attorney longer than I have. Maybe he knows a way that I don't. But I can't get it in so that's why I say it's not admissible.

And I did read that part about the harmless in the Qualley case. And the way I was reading it is it would be prejudicial, obviously, for it to be admitted. And that's what the severance is concerned with. If it's not admitted, then there's no prejudice, is the way I was looking at it. If the jury doesn't hear about it,

then there's no prejudice that would transfer over to either defendant.

THE COURT: It's not very clear, but I do think they're using harmful as a term of art in the sense of harmful error, which means you have to have committed error in the first place. And they do expressly say the trial court should have severed the cases on evidence of previous admissible convictions.

And then they go on to say that it wasn't harmful because they didn't offer any evidence. So I think they're -- it's a little hard to tell. You can tell a little bit more from Judge Hervey's concurrence that they do think it's error but harmless.

Anything further from the State on its motion?

MR. PUTMAN: No, Your Honor.

THE COURT: Anything further from either defendant on the response?

MR. RATEKIN: Your Honor, the prior felony was actually provided to me by the DA's office on July 31st. I've not had an opportunity to respond or give notice of defense experts in a way to get this information that would be admissible and I'm not going to go in to my trial strategy on that point until I have to.

It's my belief that the prior felony would be admissible. I would do my best to make sure that it's admissible by calling whichever witness I need to call. But I'm not at a point where I have to disclose my experts on this yet and I'm not going to go over my trial strategy at this point in time.

But I do believe that the prior felony that Mr. -- felonies that Mr. Putman provided to me would become an issue.

THE COURT: All right. The Court is reviewing the State's notice of intent to offer evidence under 404 (b), 609, and 37.07 as a part of the Court's file.

It does list five prior convictions. The Court is not aware that those would be admissible. The Court is not aware of anything about those as to the level of felonies or misdemeanors those might be.

The Court is going to place these two cases on the trial -- same trial docket and carry the decision of whether to try them together until the day of trial. I'm sorry that will inconvenience someone, but perhaps not as much as trying them together or separately, whichever way it comes out.

And I did notice in some of the cases that if the grounds for a severance are not apparent -- in

other words, if the -- it's impossible to tell if the evidence would be admissible until you're in the trial. Then a motion to sever is appropriate during trial, too. Which would be even more inconvenient, I guess, but still not barred.

Okay. Anything further on this case from either the State or the defense?

MR. PUTMAN: No, Your Honor.

MR. RATEKIN: No, Your Honor.

MR. ELLIS: No, Your Honor.

THE COURT: All right. Thank you very much. We're in recess on this matter.

(Proceedings adjourned.)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF SMITH)

I, Cassie Condrey, Official Court Reporter in and for the 114th District Court of Smith County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and -numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 29th day of June, 2014.

_/s/Cassie Condrey_____
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